

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

B010

Appellant

- and -

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO,
CANADIAN ASSOCIATION OF REFUGEE LAWYERS,
CANADIAN COUNCIL FOR REFUGEES,
AMNESTY INTERNATIONAL (CANADIAN SECTION, ENGLISH BRANCH),
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS,
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Interveners

FACTUM OF THE
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

JESUS RODRIGUEZ HERNANDEZ

Appellant

- and -

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

- and -

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BRANCH), DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS,
UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

Interveners

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

B E T W E E N:

B306

Appellant

- and -

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

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BRANCH), DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, UNITED
NATIONS HIGH COMMISSIONER FOR REFUGEES

Interveners

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

BETWEEN:

J.P., G.J.

Appellants

- and -

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO,
CANADIAN ASSOCIATION OF REFUGEE LAWYERS,
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PART I - OVERVIEW

1. Matters raised in these appeals concern important issues of law relating to the protection of refugees and asylum-seekers under the 1951 Convention Relating to the Status of Refugees (“1951 Convention”), its 1967 Protocol and related international law, in particular the Protocol Against the Smuggling of Migrants by Land, Sea and Air (“Palermo Protocol”), supplementing the United Nations Convention Against Transnational Organized Crime. These appeals raise important issues regarding the application of the 1951 Convention in the context of admissibility findings based on “people smuggling”.
2. Access to a fair and efficient refugee status determination procedure is an essential safeguard to protect refugees and asylum-seekers from *refoulement* and providing access to such a procedure is required of State Parties to the 1951 Convention. Inadmissibility under section 37(1)(b) of the *Immigration and Refugee Protection Act* (“IRPA”) on grounds of organized criminality for “people smuggling” and the consequent denial of access to a review on the merits of an asylum-seekers’ claim to refugee status, risks a breach of the principle of *non-refoulement*.
3. While an admissibility stage may be introduced by States to their asylum procedures, it applies only when either the applicant has already found effective protection in another country (‘first country of asylum’) or when responsibility for assessing the claim in substance is assumed by a third country (‘safe third country’). In such cases, an admissibility stage to the asylum procedure may be appropriate, subject to minimum procedural safeguards such as the right to be heard in order to rebut the presumption of safety.
4. Issues of criminality, including regarding the crime of “people smuggling”, are instead to be part of an assessment on the merits of an asylum claim as it affects the determination of eligibility for refugee status, under Article 1A(2) and Article 1F of the 1951 Convention.
5. UNHCR recognizes States’ authority to prevent and combat transnational organized crime. The prevention, investigation and prosecution of the crime of people smuggling, however, shall not affect the rights, obligations and responsibility of States under, inter alia, the 1951 Convention as provided for in Article 19 of the Palermo Protocol. Pursuant to Article 5, the Palermo Protocol does not allow migrants who have been the “object” of smuggling to become liable to criminal prosecution under the Protocol. This includes asylum-seekers who use the services of smugglers to seek asylum.

PART II - POSITION

6. UNHCR's submissions are strictly limited to questions of law.

PART III - ARGUMENT

A. The views of UNHCR are persuasive

7. UNHCR has the responsibility to supervise the application of international conventions for the protection of refugees, including the 1951 Convention.¹ UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines. The Supreme Court of Canada² and high courts internationally³ have endorsed the views of UNHCR as highly persuasive in interpreting the 1951 Convention, its 1967 Protocol, and related international law.⁴

B. The human rights purpose of the 1951 Convention determines the overall approach to its application

8. The Preamble to the 1951 Convention embeds the Convention within a broader human rights framework, grounded in the Charter of the United Nations and the Universal Declaration of Human Rights.⁵ This human rights purpose of the 1951 Convention is reflected in the jurisprudence of this Court. In *Canada (Attorney General) v. Ward*, this Court held that

¹ United Nations *Convention and Protocol Relating to the Status of Refugees*, Arts. 35 of the Convention (1951) and Article II of the Protocol (1967), UNHCR's Book of Authorities ("BOA"), Tab 22.

² *Ward v. Canada (Minister of Employment & Immigration)*, [1993] 2 S.C.R. 689 at para. 34, BOA, Tab 18; *Ezokola v. Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40 at paras. 35, 76-77, BOA, Tab 6; *Nemeth v. Canada (Minister of Justice)*, 2010 SCC 56 at para. 18, BOA, Tab 13.

³ Australia: *Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH*, [2006] HCA 53 at para. 76, BOA, Tab 11. United Kingdom: *Al-Sirri v. Secretary of State for the Home Department*, [2012] UKSC 54 at para. 36, BOA, Tab 2; *Regina v. Secretary of State for the Home Department ex parte Sivakumar*, [2003] UKHL 14 at paras. 7, 30, BOA, Tab 14; *Sepet (FC) v. Secretary of State for the Home Department*, [2003] UKHL 15 at para. 12, BOA, Tab 17; *Sepet and Bulbul v. Secretary of State for the Home Department*, [2001] EWCA Civ 681 at para. 11, BOA, Tab 16. United States: *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), BOA, Tab 9; *INS v. Aguirre-Aguirre*, 119 S.Ct. 1439 (1999) at p. 1447, BOA, Tab 8.

⁴ *Ezokola v. Canada (Minister of Citizenship and Immigration)*, *supra* note 2, at paras. 35, 76-77, BOA, Tab 6; *Nemeth v. Canada (Minister of Justice)*, *supra* note 2 at para. 18, BOA, Tab 13; *Ward v. Canada (MEI)*, *supra* note 2, at para. 34, BOA, Tab 18.

⁵ United Nations *Universal Declaration of Human Rights 1948*, 10 December 1948, 217 A (III), BOA, Tab 26; and see also: UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, 6th edition, June 2011, June 2011, BOA, Tab 37. Executive Committee Conclusion No. 82 (XLVIII), 1997, paras. (b), (d); Executive Committee Conclusion No. 85 (XLIX), 1998, at paras. (f), (n); Executive Committee Conclusion No. 87 (L), 1999, at para. (j).

“[u]nderlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination.”⁶

9. In *Pushpanathan v. Canada (MEI)*, this Court noted “[t]he human rights character of the Convention” and held that “[t]his overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place.”⁷ This approach was affirmed by this Court again in *Ezokola v. Canada (MCI)*⁸ and in *Németh v. Canada (Justice)*.⁹ In the latter case, this Court also addressed the requirement that IRPA, which expressly incorporates certain provisions of the 1951 Convention, be construed and applied in a manner that is consistent with Canada’s obligations under international treaties and principles of international law, including international human rights law.¹⁰

10. Specifically, s. 3(2)(b) notes that the object of the IRPA is inter alia “to fulfil Canada’s international legal obligations with respect to refugees”, while s. 3(3)(f) of the IRPA provides, “[t]his Act is to be construed and applied in a manner that...complies with international human rights instruments to which Canada is a signatory.” Section 3(3)(f) of IRPA is mandatory.

C. Fair and efficient refugee determination procedures are essential to the full and inclusive application of the 1951 Convention

11. The right to seek and enjoy asylum from persecution in another country in Article 14(1) of the Universal Declaration of Human Rights 1948¹¹ is implemented in part by the 1951 Convention and its 1967 Protocol, to which Canada is a State Party. Central to the realization of this right is the obligation of States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened. The *non-refoulement* principle is a cardinal principle of international refugee law most prominently expressed in Article 33 of the 1951

⁶ *Ward v. Canada (MEI)*, *supra* note 2, at para. 34, BOA Tab 18.

⁷ *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982, at para. 57, J.P. and G.J.’s Appellant Book of Authorities (“JP ABOA”) Vol III, Tab 49.

⁸ *Ezokola v. Canada (MCI)*, *supra* note 2, at para. 32, BOA, Tab 6.

⁹ *Németh v. Canada (Minister of Justice)*, *supra* note 2, at para. 86, BOA, Tab 13.

¹⁰ *Ibid* at para. 21, BOA, Tab 13, and para. 34, Hernandez’s Appellant Book of Authorities (“Hernandez ABOA”), Vol. II, Tab 45.

¹¹ Article 14(1) provides that “Everyone has the right to seek and to enjoy in other countries asylum from persecution” *supra* note 5, BOA, Tab 26.

Convention and recognized as a norm of customary international law.¹² Article 33(1) prohibits States from expelling or returning a refugee to a territory where she or he would be at risk of threats to life or freedom. The *non-refoulement* principle as expressed in Article 33(1) is reflected in jurisprudence applying s. 7 of the Canadian Charter of Rights and Freedoms, exemplified by this Court's decisions in *Singh v. Canada* and *Charkaoui v. Canada*.¹³

12. Refugee status is declaratory in nature, meaning that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition.¹⁴ Thus, the prohibition of *refoulement* applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined.¹⁵ Accordingly, States are obliged not to return or expel an asylum-seeker to his or her country of origin pending a final determination of his or her refugee status.

13. To give effect to their obligations in good faith¹⁶ under the 1951 Convention including the prohibition against *refoulement*, States Parties are required to make independent inquiries as to the need for international protection of persons seeking asylum,¹⁷ a duty recognized by a wide

¹² See, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para. 4, BOA, Tab 30; Concurring Opinion of Judge Pinto de Albuquerque in European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, , 23 February 2012, at para. 42, B306's Appellant Book of Authorities ("B306 ABOA"), Tab 14. See, also, UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, BOA, Tab 35; UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection/Second Track], 20 June 2001, paras. 193-253, BOA, Tab 33.

¹³ *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at para. 47, Hernandez BOA, Vol II., Tab 63; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 14, Hernandez BOA, Vol I., Tab 24; See also *De Melo v. Canada (Citizenship and Immigration)*, 2014 FC 1094 at paras. 31-40, BOA, Tab 5.

¹⁴ UNHCR *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, Reissued December 2011, para. 28, BOA, Tab 34; *Nemeth v. Canada*, *supra* note 2, at para. 50, BOA, Tab 13.

¹⁵ See UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, *supra* note 5, BOA, Tab 34. Executive Committee of the High Commissioner's Programme (ExCom), Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i). See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, BOA, Tab 31; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, paras. 26-31, BOA, Tab 28.

¹⁶ *Vienna Convention on the Law of Treaties*, 22 May 1969, 1155 UNTS 331, Artz 26, BOA, Tab 27; James Hathaway, "Prosecuting a Refugee for 'Smuggling' Himself", University of Michigan Public Law Research Paper No. 429, published in (2014) 15(81) *LSN Immigration, Refugee & Citizenship Law eJournal* at para. 4, BOA, Tab 1.

¹⁷ UNHCR, *UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, at para. 74-75, BOA, Tab 36.

range of national and regional courts,¹⁸ and provide them access to fair and efficient refugee determination procedures.¹⁹ Such procedures need to allow for an examination of the relevant facts and the application of the eligibility criteria of Article 1 of the 1951 Convention, in order to help a State determine who should benefit from refugee protection, and who should not.²⁰

(i) Admissibility procedures are only appropriate in limited circumstances, subject to minimum procedural safeguards

14. At international law States may institute an admissibility stage (where the case will not be examined on its merits) to their asylum procedures to determine only when either the applicant has already found effective protection in another country ('first country of asylum') or when responsibility for assessing the claim in substance is assumed by a third country ('safe third country').²¹ In such cases, an admissibility stage to the asylum procedure may be appropriate, but must still include minimum procedural safeguards such as the right to be heard in order to rebut the presumption of safety.

15. Reliance on s. 37(1)(b) of IRPA to deem a person seeking refugee status inadmissible to Canada denies that person access to a fair and efficient procedure involving a full examination of the relevant facts and the application of the eligibility criteria of Article 1 of the 1951 Convention. It would not be in keeping with the good faith principle and the human rights purpose of the 1951 Convention and may pose a risk of *refoulement* contrary to Article 33(1) of the 1951 Convention.

¹⁸ *Hirsi Jamaa and Others v. Italy*, *supra* note 12, at para. 146-148, B306 ABOA, Tab 14; *MSS v Belgium and Greece* (2011) 53 ECHR 2 at paras. 286, 298, 315, 321, 359, BOA, Tab 12; *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, [2004] UKHL 55, [2005] 2 AC 1 at para. 26, BOA, Tab 14; *C & Ors v Director of Immigration & Anor* (HK Court of Final Appeal, 25 March 2013) at paras. 56, 64, BOA, Tab 3.

¹⁹ UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, *supra* note 5, BOA, Tab 34. ExCom Conclusion No. 82 (XLVIII) 1997, para. (d) (iii); Conclusion No. 81 (XLVIII) 1997, para. (h) (A/AC.96/895, para. 18); Conclusion No. 82 (XLVIII) 1997 para.(d)(iii) (A/AC.96/895, para.19); Conclusion No. 85 (XLIX), 1998, para. (q) (A/AC.96/911, para. 21.3)

²⁰ *Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)*, *supra* note 18, at para. 26, BOA, Tab 14.

²¹ See *Asylum Processes (Fair and Efficient Asylum Procedures)*, EC/GC/01/12, 31 May 2001, at para. 8, BOA, Tab 29. See also *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on procedures in Member States for Granting and Withdrawing Refugee Status* (Council Document 14203/04, Asile 64, of 9 November 2004), BOA, Tab 32.

16. In *Febles*, this Court provided that “the ten-year rule should not be applied in a mechanistic, decontextualized, or unjust manner”²² in connection with the admissibility provision under s. 36 of IRPA. For asylum-seekers, the impact of a finding of inadmissibility under s.37(1)(b), or any of the other admissibility sections in IRPA, results in denial of a review of the merits pursuant to the refugee criteria provided for in the 1951 Convention prior to removal. Absent this review and the fact that s.37(1)(b) does not allow the decision-maker to consider the risk of *refoulement*, the adoption of the strict approach of the Federal Court of Appeal in the cases under appeal would invite the application of the formalistic and mechanistic approach that this court disapproved of in *Febles*.

17. The possibility of seeking discretionary Ministerial relief under ss. 42.1 or 112(1) of the IRPA does not provide a satisfactory remedy or mechanism to protect claimants from *refoulement* as these provisions do not require a review of the applications in accordance with the eligibility criteria for refugee status under the 1951 Convention. As noted, the prohibition on *refoulement* imposes duties on States to inquire properly into the asylum-seeker’s need for international protection, and as such, as a core duty it cannot be the subject only of discretion.

18. Any effective remedy in relation to a claim for international protection requires rigorous scrutiny because of the irreversible nature of the harm that might occur.²³ The remedy must be effective in practice as well as in law and it must take the form of a guarantee, not a mere statement of intent or a practical arrangement.²⁴ Remedies noted in paragraph 17 which have virtually no prospect of success in a particular case are ineffective.²⁵ The right to an effective

²² *Febles v. Canada (Minister of Citizenship and Immigration)*, 2014 SCC 69 at para. 62, BOA, Tab 7.

²³ *Jabari v. Turkey*, Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000, at para. 50, BOA, Tab 10.

²⁴ *Conka v. Belgium*, Application No. 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002, at para. 83, BOA, Tab 4, discussing the scope of Article 13, the Right to an Effective Remedy under the European Convention for the Protection of Human Rights and Fundamental Freedoms. See Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 13, BOA, Tab 20.

²⁵ *Salah Sheekh v. The Netherlands*, Application no. 1948/04, Council of Europe, European Court of Human Rights, 11 January 2007, at paras. 120-127, BOA, Tab 15, discussing the lack of an automatic stay of expulsion was contrary to Article 13 (right to an effective remedy) and Article 3 (prohibition against torture) under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

remedy is reflected in Article 2(3) of the International Covenant on Civil and Political Rights, of which Canada is a State Party.²⁶

(ii) Consideration of organized criminality would form part of an assessment on the merits of an asylum claim

19. A full and inclusive application of the 1951 Convention requires that issues of organized criminality, including people smuggling, be taken into consideration when assessing the merits of an asylum claim. These issues are relevant to the inclusion assessment under Article 1A(2) as well as the exclusion assessment under Article 1F of the 1951 Convention and they require careful examination. They would therefore find a place within the assessment of asylum claims. They cannot however act as a preliminary bar to assessing the merits of an asylum claim.

D. The prevention, investigation and prosecution of the crime of people smuggling shall not affect the rights, obligations and responsibility of states under the 1951 Convention

20. In keeping with Canada's international obligations, including in respect of consistency with the Palermo Protocol, the specific term "people smuggling", not clearly defined in the IRPA or other instrument in Canadian law, would wisely draw on its international meaning. People smuggling is defined in the Palermo Protocol as the "smuggling of migrants", as the procurement of the illegal entry of a person in order to obtain, directly or indirectly, financial or other material benefit, as part of a transnational organised crime.²⁷ Canada has ratified the Protocol.²⁸

(i) Palermo Protocol to be used to interpret the meaning of "people smuggling"

21. Section 3(3)(f) of the IRPA provides, "[t]his Act is to be construed and applied in a manner that...complies with international human rights instruments to which Canada is a signatory." The Palermo Protocol seeks to prevent and combat the smuggling of migrants, while

²⁶ United Nations *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2(3), BOA, Tab 23. See also, Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 24, Article 13, BOA, Tab 20; *Charter of Fundamental Rights of the European Union* (2007/C 303/01), Article 47, BOA, Tab 19; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, Article 39, BOA, Tab 21.

²⁷ Article 3 read in conjunction with Article 1 in United Nations Office on Drugs and Crime, *Protocol against the Smuggling of Migrants by Land, Sea and Air ("Palermo Protocol")*, 2000, BOA, Tab 24.

²⁸ United Nations Office on Drugs and Crime, *Protocol against the Smuggling of Migrants by Land, Sea and Air* County List, BOA, Tab 22.

recognising important protections of human rights of migrants. Its preamble notes clearly that “*Convinced* of the need to provide migrants with humane treatment and full protection of their rights...” In particular, in Article 19, it requires State Parties to implement their obligations under the Protocol taking into account the rights, obligations and responsibilities of States under international law, with explicit reference to the 1951 Convention, the 1967 Protocol and the principle of *non-refoulement* as contained therein.

22. While the Protocol requires State Parties under Article 6 to adopt legislative and other measures as may be necessary to establish criminal offences with regard to, *inter alia*, “people smuggling”, such measures, including the definition used in national law and practice, shall not affect the rights, obligations and responsibilities of States under the 1951 Convention, as per Article 19 of the Protocol. For the purposes of interpreting s. 3(3)(f) of the IRPA, therefore, it is clear that the Protocol is an international human rights instrument, having a bearing on the rights of migrants as well as asylum-seekers.

23. The Palermo Protocol indicates in Article 1 that it is supplemental to the *United Nations Convention Against Transnational Organized Crime*, and should be interpreted and applied together with that Convention. The definition of “transnational crime” in that Convention was applied in several of the cases under appeal.²⁹ There is no reason to ignore the definition of “smuggling of migrants” in the Palermo Protocol.

24. In *de Guzman v. Canada (MCI)*, the Federal Court of Appeal emphasized that international instruments can be used to interpret the IRPA, and may be determinative of how the IRPA is to be interpreted and applied, unless there is clear legislative intent to the contrary.³⁰ The Court emphasized that s. 3(3) of the IRPA attaches more than “mere ambiguity-resolving, contextual significance to ‘international human rights instruments to which Canada is signatory.’”³¹ This holding builds on Supreme Court jurisprudence that emphasizes, “where

²⁹ See, for example, *B010 v. Canada (Minister of Citizenship and Immigration)* 2012 FC 569, at para. 12, B010’s Appeal Record, Vol I, in which the Immigration and Refugee Board interpreted “transnational crime” with reference to the *United Nations Convention Against Transnational Organized Crime*.

³⁰ *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, at paras. 82, 83, 87, JP ABOA, Vol II., Tab 27.

³¹ *Ibid.* at paras. 83, 87, JP ABOA, Vol II., Tab 27.

possible, statutes should be interpreted in a way which makes their provisions consistent with Canada's international obligations and principles of international law."³²

(ii) Who may meet the definition of "people smuggling"

25. The Palermo Protocol protects migrants who have been the object of smuggling. Article 5 mandates that migrants who are the "object" of smuggling activities, such as asylum-seekers who use the services of smugglers for the purposes of seeking protection as opposed to profiting, cannot become liable to criminal prosecution.³³

26. This is reinforced by Article 19 of the Protocol and the "statement of purpose" in Article 2 of the Protocol, which makes clear that in addition to preventing and combatting the smuggling of migrants, the Protocol is intended to protect the rights of smuggled migrants.³⁴

27. Article 31(1) of the 1951 Convention prohibits penalizing asylum-seekers who enter the country of asylum illegally. The 1951 Convention and the Palermo Protocol converge on this point. According to UNHCR's Executive Committee: "Intercepted asylum-seekers should not become liable to criminal prosecution under the [Palermo Protocol] for the fact of having been the object of conduct set forth in article 6 of the Protocol; nor should any intercepted person incur any penalty for illegal entry or presence in a State in cases where the terms of Article 31 of the 1951 Convention are met".³⁵ Denying access to asylum procedures to persons who have engaged the services of people smugglers, or who may be suspected of aiding or abetting or supporting the smuggling of persons in order to seek asylum," would not be consistent with the object and purpose of Articles 31 and 33 of the 1951 Convention. This position is supported by academic commentators.³⁶

³² *Nemeth v. Canada (Justice)*, *supra* note 2, at para. 34; BOA, Tab 13. See also *Baker v. Minister of Citizenship and Immigration*, [1999] 2 SCR 817, JP ABOA, Vol I, Tab 7.

³³ *Palermo Protocol*, *supra* note 27, Article 5, BOA, Tab 24.

³⁴ See, for example, *Palermo Protocol*, *supra* note 27, BOA, Tab 24: Preamble ("provide migrants with humane treatment and full protection of their rights"), Article 4 (applies to offences and to protection of rights of persons who have been subject to offences), Article 14.1, Article 16 (protection and assistance measures), Article 18 (return of smuggled migrants), Article 19 (Protocol does not affect other obligations under international law, including the 1951 Convention and 1967 Protocol).

³⁵ UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, *supra* note 5, BOA, Tab 34. Executive Committee Conclusion No. 97 (LIV) (2003), para. (a)(vi).

³⁶ Hathaway, "Prosecuting a Refugee for 'Smuggling' Himself," *supra* note 16, BOA, Tab 1.

28. The Protocol's protection extends to asylum-seekers helping others illegally enter a country. The *travaux préparatoires* of the Protocol support this interpretation. They reveal that the offences foreseen in Article 6, including the smuggling of migrants, do not include the activities of those who provide support to migrants for humanitarian reasons, or on the basis of close family ties, of a migrant possessing a fraudulent document to enable his or her own smuggling, or a migrant who enables his or her own smuggling.³⁷

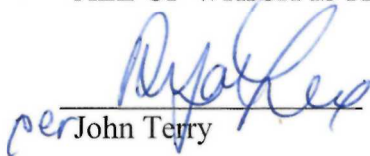
29. Where asylum-seekers assist a smuggling operation, the definition of "smuggling of migrants" in Article 3 of the Protocol read in conjunction with Article 1 and the United Nations Convention against Transnational Organized Crime requires the act to be part of a transnational organized crime. Similarly, Article 4 of the Convention requires the offences to "involve an organized criminal group."

30. There may be many reasons why asylum-seekers may have "assisted" the smugglers – either under coercion or duress, to ensure safe passage, or to ensure safe passage of a relative. Regardless of the operational context, an asylum-seeker who may have assisted in people smuggling should have the same access to asylum procedures as those who have been smuggled, and the nature of their assistance should be determined and assessed within Article 1A(2) and Article 1F of the 1951 Convention.

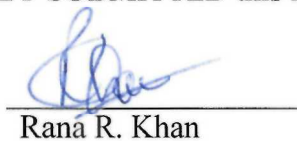
PARTS IV AND V - STATEMENT ON COSTS AND ORDER SOUGHT

31. UNHCR seeks no costs and respectfully asks that no costs are awarded against them. UNHCR Seeks leave to present oral argument before the Court based on these submissions.

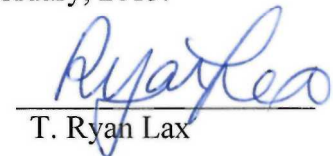
ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of February, 2015.


per. John Terry

Counsel for UNHCR


Rana R. Khan

Counsel for UNHCR


T. Ryan Lax

Counsel for UNHCR

³⁷ United Nations Office on Drugs and Crime, *Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, pp. 472, 489, 540, 519, BOA, Tab 25.

PART VI - TABLE OF AUTHORITIES

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28	<i>Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol</i> , January 2007	11
2	<i>Al-Sirri v. Secretary of State for the Home Department</i> , [2012] UKSC 54	6
29	<i>Asylum Processes (Fair and Efficient Asylum Procedures)</i> , EC/GC/01/12, 31 May 2001	13
-	<i>B010 v. Canada (Minister of Citizenship and Immigration)</i> 2012 FC 569, B010 Appeal Record, Vol I.	22
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4	<i>Čonka v. Belgium</i> , Application No. 51564/99, European Court of Human Rights, 5 February 2002	17
20	Council of Europe, <i>European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14</i> , 4 November 1950, ETS 5	17
21	Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status	17
-	<i>De Guzman v. Canada (Minister of Citizenship and Immigration)</i> , 2005 FCA 436, JP ABOA, Vol II., Tab 27	23
5	<i>De Melo v. Canada (Citizenship and Immigration)</i> , 2014 FC 1094	10
30	<i>Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees</i> , 16 January 2002, HCR/MMSP/2001/09	10
6	<i>Ezokola v. Canada (Minister of Citizenship and Immigration)</i> , 2013 SCC 40	6, 8
7	<i>Febles v. Canada (Minister of Citizenship and Immigration)</i> , 2014 SCC 69	15
-	<i>Hirsi Jamaa and Others v. Italy</i> , Application No. 27765/09, , 23 February 2012 B306 ABOA, Tab 14	10, 12

8	<i>INS v. Aguirre-Aguirre</i> , 119 S.Ct. 1439 (1999)	6
9	<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	6
10	<i>Jabari v. Turkey</i> , Appl. No. 40035/98, Council of Europe: European Court of Human Rights, 11 July 2000	17
1	James C. Hathaway, "Prosecuting a Refugee for 'Smuggling' Himself," <i>Public Law and Legal Theory Research Paper Series Paper No. 429</i> , December 2014	12, 26
11	<i>Minister for Immigration and Multicultural and Indigenous Affairs v. QAAH</i> , [2006] HCA 53	6
12	<i>MSS v Belgium and Greece</i> , (2011) 53 ECHRR 2	12
13	<i>Nemeth v. Canada (Minister of Justice)</i> , 2010 SCC 56 Hernandez ABOA, Vol. II, Tab 45	6, 8, 11, 23
31	<i>Note on International Protection (submitted by the High Commissioner)</i> , A/AC.96/815	11
32	<i>Provisional Comments on the Proposal for a Council Directive on Minimum Standards on procedures in Member States for Granting and Withdrawing Refugee Status</i> (Council Document 14203/04, Asile 64, of 9 November 2004)	13
-	<i>Pushpanathan v. Canada (Minister of Employment and Immigration)</i> , [1998] 1 S.C.R. 982 JP ABOA, Vol III., Tab 49	8
14	<i>Regina v. Immigration Officer at Prague Airport and another (Respondents) ex parte European Roma Rights Centre and others (Appellants)</i> , [2004] UKHL 55, [2005] 2 AC 1	6, 12
15	<i>Salah Sheekh v. The Netherlands</i> , Application no. 1948/04, Council of Europe, European Court of Human Rights, 11 January 2007	17
16	<i>Sepet (FC) v. Secretary of State for the Home Department</i> , [2003] UKHL 15	6
17	<i>Sepet and Bulbul v. Secretary of State for the Home Department</i> , [2001] EWCA Civ 681	6
33	<i>The Scope and Content of the Principle of Non-Refoulement (Opinion)</i> [Global Consultations on International Protection/Second Track], 20 June 2001	10
37	UNHCR, <i>A Thematic Compilation of Executive Committee Conclusions, 6th edition, June 2011</i> , June 2011	7, 11, 12, 26

34	UNHCR <i>Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status</i> , Reissued December 2011	11
35	UNHCR <i>Note on the Principle of Non-Refoulement</i> , November 1997	10
36	UNHCR, <i>UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)</i> , 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011	12
22	United Nations <i>Convention (1951) and Protocol (1967) Relating to the Status of Refugees</i>	6
23	United Nations <i>International Covenant on Civil and Political Rights</i> , 16 December 1966, United Nations, Treaty Series, vol. 999	17
24	United Nations Office on Drugs and Crime, <i>Protocol against the Smuggling of Migrants by Land, Sea and Air</i> (2000)	19, 24, 25
25	United Nations Office on Drugs and Crime, <i>Travaux préparatoires of the negotiations for elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto</i>	27
26	United Nations <i>Universal Declaration of Human Rights 1948</i> , 10 December 1948, 217 A (III)	7, 10
27	<i>Vienna Convention on the Law of Treaties</i> , 23 May 1969, 1155 UNTS 331	12
18	<i>Ward v. Canada (Minister of Employment & Immigration)</i> , [1993] 2 S.C.R. 689	6, 7

PART VII – STATUTES OR REGULATIONS

English

French

Immigration and Refugee Protection Act (S.C. 2001, c. 27)

3. [...]

(2) The objectives of this Act with respect to refugees are

[...]

(b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

(3) This Act is to be construed and applied in a manner that

[...]

(f) complies with international human rights instruments to which Canada is signatory.

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

3. [...]

(2) S'agissant des réfugiés, la présente loi a pour objet :

[...]

b) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;

(3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :

[...]

f) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

Application

(3) The following provisions govern subsections (1) and (2):

(a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the Criminal Records Act, or in respect of which there has been a final determination of an acquittal;

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been

Criminalité

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Application

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en accusation, indépendamment du mode de poursuite effectivement retenu;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquiescement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la Loi sur le casier judiciaire;

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and
(e) inadmissibility under subsections (1) and (2) may not be based on an offence

(i) designated as a contravention under the Contraventions Act,

(ii) for which the permanent resident or foreign national is found guilty under the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, or

(iii) for which the permanent resident or foreign national received a youth sentence under the Youth Criminal Justice Act.

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

d) la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

e) l'interdiction de territoire ne peut être fondée sur les infractions suivantes :

(i) celles qui sont qualifiées de contraventions en vertu de la Loi sur les contraventions,

(ii) celles dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la Loi sur les jeunes contrevenants, chapitre Y-1 des Lois révisées du Canada (1985),

(iii) celles pour lesquelles le résident permanent ou l'étranger a reçu une peine spécifique en vertu de la Loi sur le système de justice pénale pour les adolescents.

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

42.1 (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

Exception — à l'initiative du ministre

Exception — Minister's own initiative

(2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraphs 35(1)(b) and (c) and subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.

Considerations

(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

[...]

(3) Refugee protection may not result from an application for protection if the person

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(d) is named in a certificate referred to in subsection

(2) Le ministre peut, de sa propre initiative, déclarer que les faits visés à l'article 34, aux alinéas 35(1)b) ou c) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de tout étranger s'il est convaincu que cela ne serait pas contraire à l'intérêt national.

Considérations

(3) Pour décider s'il fait la déclaration, le ministre ne tient compte que de considérations relatives à la sécurité nationale et à la sécurité publique sans toutefois limiter son analyse au fait que l'étranger constitue ou non un danger pour le public ou la sécurité du Canada.

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

[...]

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;

d) il est nommé au certificat visé au paragraphe

77(1).

113. Consideration of an application for protection shall be as follows:

[...]

(d) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada;

77(1).

113. Il est disposé de la demande comme il suit:

[...]

d) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa e) (i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;